92-1328

Supreme Court
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No.

In The Supreme Court of the United States

October Term 1992

HARVEY GORDON,

Petitioner,

v.

STATE OF FLORIDA, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the requirement of § *768.73(2)(b)* of the *Florida Statutes* that 60% of any award for punitive damages rendered in favor of an injured tort claimant be made payable to either the State General Revenue Fund or the Public Medical Assistance Trust Fund amount to a taking of private property without just compensation in violation of the Taking Clause of the Fifth Amendment, where the award results exclusively from the injured tort claimant's time, effort, and expense in the litigation process without any assistance whatever from the State?

2. Does the requirement of § *768.73(2)(b)* of the *Florida Statutes* that 60% of any award for punitive damages rendered in favor of an injured tort claimant be made payable to either the State General Revenue Fund or the Public Medical Assistance Trust Fund, thereby placing the burden of payment on the party who suffered the wrong rather than on the wrongdoer, violate the Excessive Fines Clause of the Eighth Amendment?

3. Does the requirement of § *768.73(2)(b)* of the *Florida Statutes* that 60% of any award for punitive damages rendered in favor of an injured tort claimant be made payable to either the State General Revenue Fund or the Public Medical Assistance Trust Fund amount to a deprivation of the claimant's property without substantive due process in violation of the Fourteenth Amendment?

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OPINIONS BELOW

The Final Judgment of the Florida Circuit Court, Dade County, was originally entered on July 27, 1989 (A-1). On October 9, 1990, the Circuit Court entered an

Order Amending Final Judgment (A-3). The first opinion of the Florida District Court of Appeal for the Third District rendered in this matter was filed on August 7, 1990 (A-6) and has been officially reported at *K-Mart Corp. v. Gordon*, 565 So.2d 834 (Fla. 3d DCA 1990). The second opinion of the Florida District Court of Appeal for the Third District was filed on August 27, 1991 (A-8) and has been officially reported at *Gordon v. State*, 585 So.2d 1033 (Fla. 3d DCA 1991). The decision of the Florida Supreme Court was rendered on November 12, 1992. It appears in the Appendix at (A-19) and has not yet been officially reported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to *28 U.S.C. § 1257(a)*. The final disposition of this case below is the Florida Supreme Court's November 12, 1992 per curiam decision (A-19) determining that § *768.73(2)(b)* of the *Florida Statutes* is constitutional and approving the August 27, 1991 decision of the Florida District Court of Appeal for the Third District (A-22).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that:

> nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> nor shall any State deprive any person of life, liberty, or property, without due process of law.

Section 768.73 of the *Florida Statutes*, at all times relevant to the instant case, provided as follows:

> (1)(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty that involves willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant shall not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.
>
> (b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant shall be entitled

to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

(c) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2) In any civil action, an award of punitive damages shall be payable as follows:

(a) Forty percent of the award shall be payable to the claimant.

(b) If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

(3) In the event that the full amount of punitive damages awarded cannot be collected, the claimant and the other recipient designated pursuant to paragraph (2)(b) shall each be entitled to a proportional share of the punitive damages collected.

(4) Claimant's attorney's fees, if payable from the judgment, shall, to the extent that they are based on the punitive damages, be calculated based only on the portion of the judgment payable to the claimant as provided in subsection (2). Nothing herein shall be interpreted as limiting the payment of attorney's fees based upon the award of damages other than punitive damages.

(5) The jury shall not be instructed, nor shall it be informed, as to the provisions of this section.

STATEMENT OF THE CASE

This case presents the paradigm example of a state getting something for nothing. The State took the greater share of the punitive damages awarded to Harvey Gordon, an abused tort claimant, without even paying so much of its fair share of litigation costs and attorney's fees.

Mr. Gordon was falsely imprisoned and battered by employees of K-Mart Corporation in an incident occurring in one of K-Mart's stores on February 16, 1987. On July 25, 1989, a jury returned a verdict in Gordon's favor on his claims for negligent retention and supervision, false imprisonment, and battery. The jury awarded $72,500 in compensatory damages and $512,000 in punitive damages. On July 27, 1989, the Florida Circuit Court, Dade County, entered a Final Judgment for a total of $584,500 solely in Gordon's favor (A-1). Subsequently, on August 7, 1990, this Judgment was affirmed in its entirety by the Florida

District Court of Appeal for the Third District, in *K-Mart Corp. v. Gordon*, 565 So.2d 834 (Fla. 3d DCA 1990) (A-6 to A-7).

The State of Florida took no part in either prosecuting Gordon's claims against K-Mart and its employees or in defending the Judgment on appeal.[1]

After the mandate was issued on September 19, 1990, K-Mart, on September 20, 1990, moved to amend the Final Judgment to comply with *Fla. Stat. Ann.* § *768.73(2)(b)* (A-27). Thereafter, on October 4, 1990, the State of Florida moved to intervene to "assert its rights" under *F.S.A.* § *768.73(2)(b)* (A-31). That section, which is part of the Florida Tort Reform and Insurance Act of 1986, 1986 *Fla. Laws* ch. 86-160, § 52, became effective on July 1, 1986, *id.* § 70, and provided at all times relevant to the case at bar as follows:

> If the cause of action was based on personal injury or wrongful death, 60 percent of the [punitive damages] award shall be payable to the Public Medical Assistance Trust Fund created in § 409.2662; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

On October 9, 1990, the trial court granted the motions of K-Mart and the State of Florida (A-34) and entered an Order Amending Final Judgment, *nunc pro tunc* (A-3). The Order reduced Gordon's July 27, 1989

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[1]In fact, the State of Florida, upon K-Mart's complaint, criminally prosecuted Mr. Gordon for Retail Theft/Shoplifting. Mr. Gordon was acquitted of such alleged crime.

Final Judgment from a total of $584,500 down to $277,300. (A-4). The Order further entered a judgment in favor of the General Revenue Fund of the State of Florida in the amount of $307,200, "which sum represents sixty (60) percent of the punitive damage award" (A-4). While the District Court of Appeal upheld the trial court's Order in *Gordon v. State*, 585 So.2d 1033 (Fla. 3d DCA 1991) (A-8), it certified to the Florida Supreme Court "that this case involves a question of great public importance as to the constitutionality of § *768.73(2)(b)*" *Id.* at 1038 n.13 (A-18).

On appeal to the Florida Supreme Court,[2] Gordon raised a number of arguments attacking the constitutionality of *F.S.A.* § *768.73(2)(b)*, including that this section amounted to an unconstitutional "taking" of Gordon's property in violation of the Fifth Amendment (A-54, to A-57), that it violated the Eighth Amendment's Excessive Fines Clause (A-58, 61-63), and that it deprived Gordon of property without substantive due process in violation of the Federal Constitution (A-54-55, 56, 57, 59, 61). The Florida Supreme Court, in a per curiam opinion, concluded that "no substantive due process violation occurred" (A-20), adopting the reasoning of the District Court of Appeal in *Gordon v. State, supra*, 585 So.2d at 1035 (A-11), that Gordon had "no cognizable, protectable property right to the recovery of punitive damages at

[2]Gordon raised general objections to the constitutionality of § 768.73(2)(b) before the trial court (A-38, 42, 43). In his briefs filed with the district court, he attacked the statute as violating the Fifth (A-50, 51), Eighth (A-47, 51) and Fourteenth Amendments (A-51).

all" (A-20). The Court further reasoned that § *768.73(2)(b)* bore a rational relationship to two "legitimate legislative objectives: [1] to allot to the public weal a portion of damages designed to deter future harm to the public and [2] to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney" (A-21).

While the Florida Supreme Court did not specifically address Gordon's Fifth and Eighth Amendment claims, it did state that "[w]e have considered the other constitutional claims" and indicated that it had rejected all such claims (A-21). The Florida Supreme Court accordingly determined that § *768.73(2)(b)* was constitutional and approved the decision of the District Court of Appeal (A-22).

Justice Shaw of the Florida Supreme Court filed a dissenting opinion, concluding that § *768.73(2)(b)* effected an unconstitutional taking of Gordon's property without just compensation (A-22-25).

REASONS WHY THE PETITION SHOULD BE GRANTED

This Petition raises several weighty and precedential questions of federal constitutional law concerning the constitutionality of Florida's punitive damages "sharing" statute, *F.S.A.* § *768.73(2)(b)*, which at all times pertinent to this action required an injured Florida tort claimant to pay to the state 60% of any award for punitive damages recovered by him in a civil

tort action.[3] That these questions are of great public importance can be seen from the fact that, aside from Florida, at least seven other states have enacted similar statutes permitting their treasuries or agencies to grab sizeable portions of punitive damages awards rendered in various types of private litigation.[4] Jurists in still other states have advocated recognizing an inherent judicial power to compel the payment of a portion of a punitive damages award either to the state general fund

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[3]Effective April 8, 1992, *F.S.A.* § 768.73(2)(b) was amended to reduce the share of punitive damages payable to the state from 60% to 35%. 1992 *Fla. Laws* ch. 92-85, § 2. This amendment applies solely to those "pending cases and causes of action *in which a judgment has not been entered*," *id.* § 4 (emphasis added), and thus does not apply to this case in which a judgment was entered on July 27, 1989.

[4]*See Colo. Rev. Stat.* § 13-21-102(4) (requiring one-third of any punitive damages collected to be paid into the state general fund); *Ga. Code Ann.* § 51-12-5.1(e)(2) (requiring 75% of any punitive damages collected, less a proportionate part of the costs of litigation including reasonable attorney's fees, to be paid into the state treasury); *Ill. Rev. Stat.* ch. 110, ¶ 2-1207 (authorizing trial court, in its discretion, to apportion punitive damages award among the plaintiff, the plaintiff's attorney and the state department of rehabilitative services); *Iowa Code Ann.* § 668A.1(2)(b) (requiring distribution of 75% of punitive damage award to civil reparation tort fund); *Mo. Ann. Stat.* § 537.675 (providing that 50% of any final judgment awarding punitive damages, after the deduction of attorney's fees and expenses, shall be deemed rendered in favor of the state); *Or. Rev. Stat.* § 18.540(1)(c) (allocating, after attorney's fees are paid, one half of punitive damages award to criminal injuries compensation account); *Utah Code Ann.* § 78-18-1(3) (requiring 50% of the amount of punitive damages awarded and paid in excess of $20,000, after payment of attorney's fees and costs, to be deposited in state general fund).

or to some special fund that serves a public purpose or advances the cause of justice.[5]

THE 60% TAKING IS A VIOLATION OF THE FIFTH AMENDMENT.

Section 768.73(2)(b) violates the Taking Clause of the Fifth Amendment. The first question presented by the Petition is whether § *768.73(2)(b)* effected a taking of Gordon's property without just compensation in violation of the Fifth Amendment's Taking Clause, which has long been held to apply to the states through the Fourteenth Amendment. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 122 (1978); *Chicago, Burlington, & Quincy Railroad v. City of Chicago*, 166 U.S. 226, 239 (1897). The decision of the Florida Supreme Court on this issue is in direct conflict with *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), wherein the Colorado Supreme Court struck down as violative of the federal taking clause the requirement of *Colo. Rev. Stat.* § 13-21-102(4) that one third of a punitive damages award be paid into the state general fund.[6]

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[5]*See Fuller v. Preferred Risk Life Insurance Co.*, 577 So.2d 878, 887 (Ala. 1991) (Shores, J., concurring specially); *Hilgedick v. Koehring Finance Corp.*, ___ Cal. App. 3d ___, 8 Cal. Rptr. 76, 99 (1992) (Peterson, A.J., concurring in the result).

[6]On the other hand, the Florida Supreme Court's decision is in accord with the holding of the Iowa Supreme Court in *Shepard Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612 (Iowa 1991), that the application of *Iowa Code Ann.* § 668A.1(2)(b) to require, in certain specified circumstances, the distribution of 75% of a punitive damages award to the state civil reparation trust fund did not effect an unconstitutional taking of property in violation of the federal Constitution.

The taking clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transportation Co. v. City of New York, supra*, 438 U.S. at 122; *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In determining whether a "taking" has occurred, this Court has considered the totality of circumstances underlying the governmental interference with private property rights, including the character of the governmental action, its economic impact, and its interference with the reasonable economic expectations of the property owner. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

The Florida courts essentially concluded that Gordon did not have any protectable property interest in the recovery of an award of punitive damages due to the undoubted power of the state to restrict or even to abolish the recovery of punitive damages before a claim for such damages has been reduced to judgment, *see Ross v. Gore*, 48 So.2d 412, 414 (Fla. 1950), and that, consequently, no taking of private property (or substantive due process violation) occurred. This is not a case, however, where the State of Florida has, by statute or judicial pronouncement, abolished or even restricted the recovery of awards of punitive damages in civil actions for intentional torts, such as false imprisonment and battery. The State of Florida continues to permit claimants in such civil actions to recover awards of punitive damages in unrestricted amounts.

Rather, the State in this case has sought, by statute, to declare that a lion's share of what would otherwise be the sole private property of the injured tort claimant, i.e., a recovered civil judgment or award for punitive damages, is payable to the State General Revenue Fund. *F.S.A.* § *768.73(2)(b)*. Under the terms of the statute as it existed at all times relevant to the instant case, the State of Florida was neither made a party to the litigation nor was it granted the status of a judgment creditor (A-37, 41, 42).[7] Moreover, under both federal law and the law of Florida, a person who is not a party to an action may not be made a party to a judgment entered in that action. *Illinois Surety Co. v. United States*, 240 U.S. 214, 226-27 (1916); *Warshaw-Seattle, Inc. v. Clark*, 85 So.2d 623, 625-26 (Fla. 1955). The State therefore had no interest in Gordon's claim for punitive damages, or in the litigation itself, at any time before a judgment or enforceable award for punitive damages was recovered by Gordon (A-41).[8]

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[7]While the Florida Legislature recently amended § 768.73 to direct that "[i]n the final judgment the court shall order the percentages of the award, payable as provided in subsection (2)," 1992 *Fla. Laws* ch. 92-85, § 2 (to be codified at *F.S.A.* § 768.73(3)), this amendment does not apply to the instant case. *See* 1992 *Fla. Laws* ch. 92-85, § 4.

[8]While the term "award" as used in § 768.73 is nowhere defined by statute, it has generally been held that an "award" means a judgment, sentence, or final decision. *E.g., Higginbotham v. State*, 20 Ala. App. 159, 101 So. 166 (1924); *Brantley v. ADH Building Contractors, Inc.*, 215 So.2d 297, 299 (Fla. 1968); *State ex rel. Engle v. Industrial Commission*, 142 Ohio St. 425, 52 N.E.2d 743, 747 (1944). Moreover, at least two states have recently interpreted the term "award" as used in their respective Tort Reform Acts as meaning "a remedy recoverable in accordance with an order for judgment," *Lira v. Davis*, 832 P.2d 240, 245 (Colo.

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Indeed, the State did not move to assert its right to payment of a portion of the punitive damages award until *after* a judgment for the full amount of the punitive damages assessed by the jury had been entered by the circuit court, that judgment had been affirmed in its entirety by the district court, and the district court's Mandate had issued. As Justice Shaw correctly concluded, "Mr. Gordon had a vested property right by the time the State intervened to claim its lion's share of the punitive damage award" (A-23). *See McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898); *Blocker v. Ferguson*, 47 So.2d 694, 698 (Fla. 1950).

Because Gordon's judgment entitled him as a judgment creditor to a satisfaction out of the real and personal property of the judgment debtor, the State's taking of 60% of that judgment was substantially equivalent to the taking of money itself. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court struck down, as violating the Fifth Amendment's Taking Clause, a Florida Statute, *F.S.A.* § *28.33*, authorizing a county to take the interest earned on an interpleader fund while deposited in the registry of the county court, where another statute imposed a

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1992), and *Tucker v. Marcus*, 142 Wis. 2d 425, 418 N.W.2d 818, 823 (1988), as distinguished from the amount of damages initially ascertained or determined by the jury.

Thus, as an "award" for purposes of § 768.73 is either a judgment or tantamount to a judgment, Gordon obtained a protected property interest upon the circuit court's entry on July 27, 1989 of a judgment for the full amount of the punitive damages assessed by the jury. The State's interest in receiving payment of a portion of the award did not arise under the statute until after a final judgment had been entered.

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fee for the clerk's services in receiving the fund into the registry. The Court reasoned that the State had not merely adjusted the benefits and burdens of economic life to promote the common good, but had exacted "a forced contribution to general governmental revenues ... not reasonably related to the costs of using the courts." *Id.* at 163. In other words, the Court ruled that "a State, by *ipse dixit*, may not transform private property into public property without just compensation," since "[t]his is the very kind of thing that the Taking Clause was meant to prevent." *Id.* at 164.

Once again, the State of Florida, by statute, is attempting to transform private property, i.e., a recovered judgment for punitive damages, into public property by directing that more than half of the judgment be paid into the state's coffers. Once again, the State, far from placing legitimate restrictions on the beneficial use and exploitation of private property or imposing a valid user fee measured as a small percentage of the award, *see United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989) (upholding, as not effecting an unconstitutional taking a federal statute requiring the Federal Reserve Bank of New York to deduct 1½% from the first $5 million dollars of an arbitration award entered by the Iran-United States Claims Tribunal), is acting to confiscate most of the award as a forced contribution to general governmental revenues "in a manner and to a degree not reasonably related to the cost of using the courts." *Kirk v. Denver Publishing Co., supra*, 818 P.2d at 271.

The forced sharing of the award with the State cannot be justified as the imposition of a valid fine or

forfeiture. As Justice Shaw pointed out (A-24), no demonstrable nexus exists between, on the one hand, any alleged governmental interest in punishing K-Mart's wrongful conduct and, on the other, the statutory imposition of a forced contribution on Gordon, the person injured by the wrongful conduct. *Id.* at 273; *cf. Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In other words, placing the burden of payment on the judgment creditor who suffered the wrong bears no rational relationship to any arguable goal of punishing the wrongdoer or deterring others from engaging in similar conduct. *Kirk v. Denver Publishing Co., supra*, 818 P.2d at 270; *cf. Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 83-84 (1988), upholding a Mississippi statute imposing a 15% penalty on a party who unsuccessfully appeals a money judgment as sufficiently related to the state's interest in discouraging frivolous appeals to survive a federal equal protection attack.

Nor has the State of Florida, in return for its forced exaction of most of Gordon's Judgment, given Gordon as the injured judgment creditor any benefit or service not furnished to other civil litigants not required to make the same contribution. *Kirk v. Denver Publishing Co., supra*, 818 P.2d at 272. As Justice Shaw observed, "[t]he State did nothing to earn its sixty-percent share of the punitive damage award" (A-24). The Judgment entered by the Circuit Court on July 27, 1989 resulted "exclusively from the judgment creditor's time, effort, and expense in the litigation process without any assistance from the state." *Id.* The State was not even required to pay for its proportionate share of the attorney's fees and costs expended by Mr.

Gordon in recovering the judgment. *See F.S.A. § 768.73(4).*

In view of these circumstances, Gordon had a reasonable economic expectation to receive the fruits of the entire judgment, which cannot be interfered with by the State to the degree attempted here without the payment of just compensation. The Court should therefore grant the Petition to resolve the split of authority among the various state supreme courts and remedy Florida's unconstitutional taking of the majority of Gordon's judgment in violation of the Fifth Amendment.

THE EIGHTH AMENDMENT IS VIOLATED WHEN THE STATE FINES, SEIZES AND EXTORTS 60% OF THE PUNITIVE DAMAGES AWARD.

Section 768.73(2)(b) violates the Excessive Fines Clause of the Eighth Amendment. The Petition further raises a grave constitutional issue as to whether *F.S.A. § 768.73(2)(b)* violates the Execssive Fines Clause of the Eighth Amendment by exacting a forced contribution to the General Revenue Fund of the State of Florida of 60% of Gordon's punitive damages judgment, even though Gordon was the plaintiff who suffered the wrong and not the wrongdoer. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court held that the Excessive Fines Clause of the Eighth Amendment does not apply to awards of punitive damages in civil cases between private parties "when the government neither has prosecuted the action *nor has any right to*

receive a share of the damages awarded." *Id.* at 264 (emphasis added). The Court expressly reserved decision on the question as to whether the excessive fines clause prohibits a state from using "the civil courts *to extract large payments or forfeitures for the purposes of raising revenue* or disabling some individual." *Id.* at 275 (emphasis added).

The question so reserved is squarely presented by the instant Petition. By giving the State of Florida a right to receive a share of the punitive damages awarded Gordon, *F.S.A.* § *768.73(2)(b)* implicates the Excessive Fines Clause of the Federal Constitution as contemplated in *Browning-Ferris. McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1578 (M.D. Ga. 1990) (*Ga. Code Ann.* § 51-12-5.1(e)(2), holds that by granting the State of Georgia the status of a nonparty judgment creditor entitled to 75% of any award of product liability punitive damages, the statute violated state and federal constitutional prohibitions as to excessive fines. In effect, the State of Florida is using the civil courts to extract large payments and fines or forfeitures from innocent plaintiffs such as Gordon. Even according "substantial deference" to the Florida legislature's judgment concerning appropriate sanctions for the conduct at issue here, the total non-gravity of Gordon's conduct, as the person who suffered the wrong rather than the wrongdoer, does not in any way justify the extreme harshness of the State's extraction of a fine or penalty in the amount of 60% of Gordon's judgment for punitive damages. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., supra*, 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part); *cf. Solem v. Helm*, 463 U.S. 277, 290-92 (1983). Consequently, the

Petition should be granted to halt the State of Florida from continuing to extract for the benefit of its treasury "excessive monetary sanctions," *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., supra*, 492 U.S. at 275, from innocent tort claimants who have done nothing more heinous than use the State's civil courts to recover punitive damages judgments against proven wrongdoers.

FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAUSE HAS BEEN VIOLATED.

Section 768.73(2)(b) deprived Mr. Gordon of his property without substantive Due Process in violation of the Fourteenth Amendment. This Petition presents an important question as to whether § *768.73(2)(b)* violates federal substantive Due Process. The statute may only survive a substantive Due Process attack if its provisions are reasonably related to a proper legislative purpose. *Nebbia v. New York*, 291 U.S. 502, 537 (1934). Allowing the State to confiscate a large share of the punitive damages recovered by an injured tort claimant does not rationally promote the State's asserted interest in deterring future harm to the public. The wrongdoer is not to any greater degree deterred by such a forced division of the punitive damages award, since with or without such division the wrongdoer pays the same amount of punitive damages. Indeed, the deterrent effect of punitive damages is actually undermined to some degree by *the State's action in taking part of the award* in that the wrongdoer, in conjunction with all other taxpayers and residents of the State, will benefit from the forced distribution of a large portion of the award to the State treasury.

Nor is the statute rationally related to the goal of discouraging punitive damages by making them "less remunerative to the claimant and the claimant's attorney" (A-21). As already mentioned above, the statute in no way restricts the amount of punitive damages that may be recovered by a claimant, such as Gordon, on an intentional tort claim. Rather, the effect of the statute is merely to require that the claimant *pay* a large portion of what he recovers to the state. Thus, far from discouraging large punitive damages awards, the statute will inevitably have the effect of encouraging claimants and their attorneys to seek the recovery of punitive damages in the maximum amount possible in order to offset or mitigate the effect of having to divide such awards with the State. The statute further aggravates this tendency by intentionally shielding the jury from any knowledge that a portion of the award must be paid to the State. *See F.S.A. § 768.73(5).*

As the Florida courts erroneously concluded that the Florida punitive damages statute is rationally related to a legitimate state goal, the Petition should be granted to invalidate § *768.73(2)(b)* as violative of substantive Due Process.

CONCLUSION

In view of the reasons and authorities set forth above, Petitioner Harvey Gordon urges this Court to issue a Writ of Certiorari, invalidate as unconstitutional the Florida punitive damages sharing statute, *F.S.A. § 768.73(b)(2)*, and remand this matter to the Florida Supreme Court with directions to reinstate the trial court's Final Judgement of July 27, 1989.

Respectfully submitted,

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